

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

COMPETITIVE PRODUCT LIST)	
ADDING ROUND-TRIP MAILER)	Docket No. MC2013-57

COMPETITIVE PRODUCT PRICES)	
ROUND-TRIP MAILER (MC2013-57))	Docket No. CP2013-75

**MOTION OF GAMEFLY, INC., TO UNSEAL
MATERIALS PREVIOUSLY FILED UNDER SEAL**

(November 1, 2013)

Pursuant to 39 C.F.R. §§ 3007.31 and 3007.33, GameFly, Inc. ("GameFly") moves to terminate the non-public status of the following portions of the Supplemental Comments filed by GameFly on September 12, 2013:

- Pages 22-24 and 32 of the Supplemental Comments.
- Pages 16-18 ¶¶ 41-46 of the supporting declaration of David Hodess.

These passages provide GameFly's comments on an IBISWorld report that the Postal Service filed in this docket on August 22, 2013, as library reference USPS-LR-MC2013-57-NP6. The Postal Service submitted the report to buttress the Postal Service's claim that round-trip DVD mail faces effective competition, and therefore should be exempted under 39 U.S.C. § 3642 from maximum price regulation. See USPS Reply Comments (August 22, 2013) at

14, 21 & n. 7, 24 (quoting and summarizing portions of IBISWorld report); *id.*, Schoeman Decl. at 4, 6-9 (same).

The Postal Service filed the original text of the IBISWorld report under seal, purportedly to protect the copyright of IBISWorld in the report:

The Postal Service purchased the report from IBISWorld. By the terms of the purchase, the report is not intended for public dissemination, and IBISWorld retains the copyright in this publication. Parties outside of this proceeding and the general public should not have unlimited access to the information in the report; nor should they have the ability to copy and redistribute IBISWorld's copyrighted material.

USPS Notice of Filing of Nonpublic Library Reference USPS-MC2013-57/NPS (August 22, 2013), Attachment A at 2. Because the Postal Service filed the IBISWorld report under seal, GameFly filed its comments on the report under seal as well. Application of GameFly, Inc., for Non-Public Treatment of Portions of Its Supplemental Comments and Supporting Declarations (September 12, 2013) at 2. GameFly noted in its Application, however, that GameFly “does not believe that all of the derivative material it is filing under seal today in fact warrants such protection.” *Id.* at 3. GameFly now moves to unseal these passages.

39 C.F.R. § 3007.33 sets the standard for deciding whether to unseal material that was previously filed under seal in a Commission proceeding. Rule 3007.33 directs the Commission to “balance the nature and extent of the likely commercial injury identified by the Postal Service against the public interest in maintaining the financial transparency of a government entity competing in

commercial markets.” *Id.*, § 3007.33(a). When, as here, the stated justification for filing the material under seal was to protect the “proprietary interest” of a “third party,” the Commission shall “balance the interests of the parties based on Federal Rule of Civil Procedure 26(c).” *Id.* § 3007.33(b). The factors weighed under Fed. R. Civ. P. 26(c) have been established in cases such as *Arnold v. Penn Dept. of Transp.*, 477 F.3d 105, 109-110 (3d Cir. 2007). See Order No. 194, Docket No. RM2008-1, *Treatment of Non-Public Materials Submitted by the Postal Service*, 74 Fed. Reg. 13370, 13371 (2009) (discussing *Arnold*); Presiding Officer’s Ruling No. C2009-1/12 (November 18, 2009) at 23 (same).

The *Arnold* factors, as summarized by the Commission, are (*id.* at 23):

- (1) The interest in privacy of the party seeking protection;
- (2) Whether the information is being sought for a legitimate purpose or an improper purpose;
- (3) The prevention of embarrassment, and whether that embarrassment would be particularly serious;
- (4) Whether the information sought is important to public health and safety;
- (5) Whether sharing of the information among litigants would promote fairness and efficiency;
- (6) Whether the party benefitting from the order of confidentiality is a public entity or official; and

(7) Whether the case involves issues important to the public.

Balancing these factors weighs strongly in favor of unsealing GameFly's comments on the IBISWorld report. First, disclosure would not injure any legitimate interest of IBISWorld. The Postal Service justified sealing of the report on the ground that public disclosure of the content of the report would infringe on IBISWorld's copyright interest in the report by making available for free a document that IBISWorld hopes to sell to additional purchasers. GameFly assumes that IBISWorld holds a valid copyright in the report, and that unrestricted publication of the text of the report would indeed impair IBISWorld's ability to sell it to others. GameFly is not proposing to unseal the report itself, however, but only GameFly's comments on it.

Those comments described the report only briefly and at a high level of generality, and only to the extent reasonably necessary to provide a context for GameFly's criticisms. GameFly did not reproduce the report in its comments, and did not quote from any of the tables, charts or figures in the report. Indeed, disclosure of what GameFly filed under seal will reveal far less to the public about the specific contents of the report than the Postal Service has already revealed in its *public* comments. See USPS Reply Comments (August 22, 2013) at 14, 21 & n. 7, 24 (quoting and summarizing report); *id.*, Schoeman Decl. at 4, 6-9 (same). Rather, the main thrust of GameFly's commentary was to note matters that were ignored or overlooked by the report—i.e., that were *not* in it. GameFly Supplemental Comments (September 12, 2013) at 22-24, 32; *id.*, Hodess Decl. at 16-18 ¶¶ 41-46.

The case for keeping GameFly's discussion of the report under seal gains nothing from the critical tenor of much of GameFly's commentary, or the possibility that public disclosures of those criticisms might tend to depress the commercial market for the report. Criticism of this kind falls within the "fair use" doctrine, and publication of the criticism does not infringe on IBISWorld's copyright.

The fair use doctrine, a longstanding principle of equity that is now codified at 17 U.S.C. § 107, provides that reproduction or other use of a copyrighted work "for purposes such as criticism" or "comment" is "not an infringement of copyright." Determining whether the use of a copyrighted work constitutes fair use under Section 107 requires consideration of four factors: (1) "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." *Id.* While copyrighted character of the IBISWorld report may satisfy 17 U.S.C. § 107(2) ("the nature of the copyrighted work"), the other three factors are dispositive.

First, the "purpose and character" of GameFly's use of the IBISWorld report was not to generate commercial revenue by selling material from the report as a substitute for the original, but to *criticize* and *comment on* the claims in the report for the purpose of defending GameFly's *own* interests. *Cf.* 17 U.S.C. § 107(1); *NXIVM Corp. v. Ross Institute*, 364 F.3d 471, 482 (2d Cir. 2004)

(inclusion of copyrighted course materials for business training seminars in a website article that criticized the materials constituted fair use); *Jartech, Inc. v. Clancy*, 666 F.2d 403 (9th Cir. 1982) (unauthorized copying of copyrighted adult movie for purpose of creating evidence that could be used in a nuisance suit against the theater showing the movie constituted fair use).

Second, as noted above, GameFly's comments summarized the report only briefly and at a high level of generality, and only to the extent reasonably necessary to provide a context for GameFly's criticisms of the work. Cf. 17 U.S.C. § 107(3); *NXIVM Corp.*, 364 F.3d at 480-481; *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 565 (1985); *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 926 (2d Cir. 1994).

Third, GameFly's summary of the IBISWorld report was not a market substitute for the original, and thus did not usurp the "potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). Stated otherwise, potential purchasers of the report would not regard GameFly's brief summary of the report as a substitute for the report itself. *NXIVM Corp.*, *supra*, 364 F.3d at 481-482 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 593 (1994)). That GameFly's criticisms might diminish demand for the report is immaterial: the concern under 17 U.S.C. § 107(4) "is not whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use *usurps* the market of the original work." *NXIVM Corp.*, 364 F.3d at 482 (citing *Campbell*, 510 U.S. at 593). The fair use defense for criticism is dispositive even when the criticism "might well harm, or even

destroy, the market for the original . . . as long as the harm stems from the force of the criticisms offered.” *NXIVM Corp.*, 364 F.3d at 482.

Finally, unsealing of GameFly’s commentary on the IBISWorld report is warranted by the last three of the *Arnold* factors: whether sharing of the information among litigants would promote fairness and efficiency; whether the party benefitting from the order of confidentiality is a public entity or official; and whether the case involves issues important to the public. Exemption of round-trip DVD mailers from maximum rate regulation would directly affect the interests not only of the Postal Service, GameFly, and Netflix, but also of smaller DVD rental companies that use round-trip DVD mail. (Indeed, two of these smaller companies have submitted comments in this docket.) Moreover, favorable Commission action on the product transfer proposal could set a precedent for other product transfer requests based solely on downstream product competition facing the Postal Service’s customers, despite the absence of any *intramodal* competition from private carriers such as UPS or FedEx for the *mail* service provided by the Postal Service. The public interest is served by the fullest possible knowledge of the arguments that have been advanced against the Postal Service’s reliance on the IBISWorld report in this context. This is particularly so because many of the postal customers that would be adversely affected by the Postal Service’s product transfer proposal, in this docket or future dockets, are individuals or small businesses that realistically lack the resources and legal expertise needed to become authorized reviewing representatives under 39 C.F.R. §§ 3007.40 or 3007.50.

Respectfully submitted,

A handwritten signature in black ink that reads "David M. Levy". The signature is fluid and cursive, with a long horizontal stroke at the end.

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